

## Autism and the ASD spectrum

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## Introduction

- In the past 50 years, autism spectrum disorder (ASD) has gone from a narrowly defined, rare disorder of childhood onset to a well publicized, advocated, and researched lifelong condition, recognized as fairly common and very heterogeneous
- ASD results from early altered brain development and neural reorganization
- ASD is now seen as a spectrum that can range from very mild to severe.
- The estimated prevalence of ASD has increased roughly 29% since 2008, 64% since 2006, and 123% since 2002.\*
  - Centers for Disease Control and Prevention (2015, August). Autism spectrum disorder: data and statistics. Retrieved from <http://www.cdc.gov/ncbddd/autism/data.html>

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## Issues of race and ethnicity

- Minority children are less likely to receive an autism diagnosis.
- African American and Hispanic children are disproportionately underrepresented among children diagnosed with autism.\*
  - \*Ten Things to Know About New Autism Data, Centers for Disease Control and Prevention (Mar. 31, 2014), <http://www.cdc.gov/features/dsautismdata/>.

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## Race and ethnicity, 2

- African American and Hispanic children who received an autism diagnosis were more likely to be children who also experienced significant intellectual impairments
- These findings raise important questions regarding the “underrecognition of ... symptoms [of autism] in some racial/ethnic groups, cultural differences influencing the decision to seek services, [and] socioeconomic disparities in access to services.”\*
  - \* Jon Baio et. al., *Prevalence of Autism Spectrum Disorder Among Children Aged 8 Years – Autism and Developmental Disabilities Monitoring Network, 11 Sites, United States, 2010* (Ctr. for Disease Control & Prevention, 2014), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6302a1.htm>

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## As defined in DSM-5

- A. Persistent deficits in social communication and social interaction across multiple contexts
- B. Restricted, repetitive patterns of behavior, interests, or activities
- C. Symptoms must be present in the early developmental period (but may not become fully manifest until social demands exceed limited capacities, or may be masked by learned strategies in later life).
- D. Symptoms cause clinically significant impairment in social, occupational, or other important areas of current functioning.
- E. These disturbances are not better explained by intellectual disability (intellectual developmental disorder) or global developmental delay. Intellectual disability and autism spectrum disorder frequently co-occur; to make comorbid diagnoses of autism spectrum disorder and intellectual disability, social communication should be below that expected for general developmental level.

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## Restricted, repetitive behaviors

- Restricted, repetitive behaviors
  - may have repetitive movements or language, such as repeating a phrase at unusual times
  - may display behavioral rigidity such as experiencing extreme distress to small changes
  - may have restricted interests that are abnormal in intensity or focus.
  - may display unusual sensory reactivity.\*
    - \* J.C. McParland, K. Law & G. Dawson, *Autism Spectrum Disorder*, 1 *Encyclopedia of Mental Health* 124 (2016).

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## Difficulties in social communication

- Persons with autism typically have:
  - deficits in social communications (struggling with sustained social interactions and two-way conversations) nonverbal communications (making poor eye contact,
  - difficulty understanding body language and facial expressions), and in
  - maintaining social relationships (often having difficulty in adjusting behaviors to match different social or occupational situations).
- Persons with autism often have:
  - repetitive movements or language (such as repeating a phrase at unusual times), and
  - may display behavioral rigidity such as experiencing extreme distress to small changes, and may have restricted interests that are abnormal in intensity or focus.

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## Why/how is this relevant to criminal defense?

- All of this makes it much more difficult for a person with autism in the criminal justice system, especially when their fate is to be decided by jurors who may either have no familiarity with autism or whose "familiarity" is based on a television stereotype, and who regularly consider demeanor evidence in evaluating a witness's credibility.
  - As a result, participation in such a system is often humiliating and shaming.
- How autism is "processed" in the criminal trial process is a topic that is largely under the radar (certainly in the legal community), and we have done this presentation so as to, we hope, inspire some discussion and reflection about some of the salient issues

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## The full scope

- With my colleague, Prof. Heather Ellis Cucolo, I have taught a ten week webinar course on Autism and the Law, see <https://concept.paloalto.edu/product/autism-and-the-law/>.
- So there is much more to consider than what I am talking about this afternoon.
- Here are some related subjects to consider>>

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## The full scope, 2

- Police encounters/arrests
- Confessions
- Incompetency
- Persons with autism as victims
- Persons with autism as witnesses
- Insanity

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## The full scope, 3

- Expert testimony
- Jury attitudes/responses
- Trial process
- Ability to testify
- Sentencing
- Death penalty

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## Public perceptions

- For now, focusing solely on jury issues.
- This population is perceived as lacking in both empathy and in remorse, and, again, these perceptions are especially problematic in courtroom settings,\* where jurors are likely to consider demeanor evidence in evaluating witnesses' credibility.
- Social impairment – often a characteristic of autism – may lead defendants on the autistic spectrum to make awkward expressions, make inappropriate statements on the witness stand, or be unable to speak in public.
  - \* See *State v. Burr*, 921 A.2d 1135 (N.J. App. Div. 2007), *aff'd as modified*, 948 A.2d 627 (N.J. 2008), where defendant had offered testimony "to assist the jury in understanding why he might act in a way that appears socially unacceptable to others."

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## Jurors on remorse and compassion

- We know that assessment of remorse and compassion might be the dispositive factor to jurors in death penalty cases.
- The Supreme Court is aware of this.
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## Jurors, 2

- In *Atkins v. Virginia* (striking down the death penalty for defendants with intellectual disabilities)\*, the Supreme Court held that demeanor of such defendants "may create an unwarranted impression of lack of remorse for their crimes."
- In his concurring opinion in *Riggins v. Nevada* (granting defendants on trial pleading not guilty by reason of insanity the right to refuse antipsychotic medication)\*\* Justice Kennedy focused on this issue extensively:
  - "Assessments of character and remorse may carry great weight and, perhaps, be determinative of whether the offender lives or dies."
- There is no reason to expect jurors would respond any differently in more typical criminal trials.\*\*\*
  - \* 536 U.S. 304, 321 (2002).
  - \*\* 504 U.S. 127, 144 (1992).
  - \*\*\* See generally, Michael L. Perlin, "Merchants and Thieves, Hungry for Power": Prosecutorial Misconduct and Passive Judicial Complicity in Death Penalty Trials of Defendants with Mental Disabilities, 73 WASH. & LEE L. REV. 1501, 1532 (2016).

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## What needs to be done

- To remediate this situation before us, we must adopt a new approach to trials of persons with autism to provide dignity to the persons at risk, and to comply with principles of therapeutic jurisprudence.
- Here are a few examples that I think are relevant >>>

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## What judges must convey to jurors in the voir dire process

- In the voir dire:
  - Judges must explain to jurors that they cannot rely on their false "ordinary common sense" [discussed earlier] about what remorse "looks like" or what an empathetic person "looks like."
  - Judges must make clear that jurors' "ordinary common sense" is simply wrong – that it is premised on media stereotypes or the heuristic of one person they may know, and that it cannot guide their behavior.

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## What judges must convey, 2

- Great care must be taken in selecting jurors for such trials.
- Careful questions must be asked during the *voir dire* process (in assessing which jurors should be able to sit on the case) to determine the extent to which prospective jurors have expectations/pre-conceptions of what remorse and empathy "look like" may not comport with the reality of how persons with autism appear.
  - These expectations reflect a kind of false "ordinary common sense" [discussed earlier] that, if left unchecked, will result in "wrong" verdicts
- In short, great care must be taken in selecting jurors for such trials, and this selection process demands close care be taken during *voir dire*

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## The need for expert help

- I believe that it may be essential in such cases for the defense to call two experts: one who has evaluated the defendant (the usual role of such experts), and one who has been retained to explain to jurors why their preconceptions about persons with mental disabilities are, bluntly, all wrong.\*
- \* See generally, in the specific context of autism, Michael L. Perlin & Heather Ellis Cucolo, "Something's Happening Here/But You Don't Know What It Is": How Jurors (Mis)Construe Autism in the Criminal Trial Process, 82 U. PITT. L. REV. -- (2021) (in press), accessible at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3664705](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3664705); see generally, Michael L. Perlin, "Deceived Me into Thinking/I Had Something to Protect": A Therapeutic Jurisprudence Analysis of When Multiple Experts Are Necessary in Cases in which Fact-finders Rely on Heuristic Reasoning and "Ordinary Common Sense," 13 LAW J. SOC'L JUST. 88 (2020).

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## Points that may need reinforcing to jury

1. Persons with autism may not behave appropriately for their age level, and may choose to socialize with people who are younger.
2. They may act impulsively and fail to understand the consequences of, or the seriousness, of their actions.
3. Their basic skill set might be limited which could impact their ability to understand the consequences of a conviction or plea.

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## Charge to the jury

- At the conclusion of the trial, the judge's charge to the jury must incorporate sufficient information to make it less likely that stereotypical biases infect the final case outcome.
- Thus, the judge's charge to the jury should include information about the impact of autism on a defendant's demeanor, focusing in on how the juror's expectations/pre-conceptions of what remorse and empathy "look like" may not comport with reality

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## Charge to the jury, 2

- This is especially vital because of how jurors may be negatively influenced by stigmatizing beliefs and misconceptions with respect to autism.\*
  - A concern: Judges have limited understanding and familiarity with autism, and like jurors, over-rely on false "ordinary common sense."\*\*
  - \* See Clare S. Allely & Penny Cooper, *Jurors' and Judges' Evaluation of Defendants with Autism and the Impact on Sentencing: A Systematic Preferred Reporting Items for Systematic Reviews And Metaanalyses (PRISMA) Review of Autism Spectrum Disorder in the Courtroom*, 25 J. L. & Med. 105 (2017).
  - \*\* Id.

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## Charge to the jury, 3

- **An example:**
  - 168 jury-eligible participants read a vignette describing a male who was brought to the attention of police for suspicious and aggressive behaviors and who displayed atypical behaviors in court.
  - Half of the participants were informed that he had autism spectrum disorder (ASD) and were given background information about ASD; the other half received no diagnostic label or information.

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## Charge to the jury, 4

- The provision of a label and information led to higher ratings of the defendant's honesty and likeability, reduced blameworthiness, and resulted in fewer guilty verdicts, and more lenient sentencing.
- Participants in the label condition were more empathetic and attributed his behaviors to his ASD and mitigating factors, while participants in the No label condition perceived the defendant as deceitful, unremorseful, rude and aggressive.\*
- \* See Katie Maras, Imogen Marshall & Chloe Sands, *Mock Juror Perceptions of Credibility and Culpability in an Autistic Defendant*, 49 J. Autism & Devel. Disorders 996 (2019).

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## Other aspects of the criminal trial process

- This discussion should in no way leave you with the feeling that the only work left to be done is at the trial stage.
- The impact of an autism diagnosis on questions related to competency, responsibility, and sentencing may be crucial, and these issues are worthy of a separate presentation.\*
- \* See e.g., Thomas A. Mayes, *Persons with Autism and Criminal Justice: Core Concepts and Leading Cases*, 5 J. Positive Behavior Interventions 92 (2003).

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## Other aspects, 2

- A sentencing case to consider:
  - In U.S. v. Zuk, 874 F. 3d 398, 412 (4th Cir. 2017), the Court, at the Government's request, vacated a time-served 26- month sentence for such possession as "substantively unreasonable," concluding that the defendant's "mild autism diagnosis" was below the "bare minimum necessary to reflect seriousness of offense, promote respect for law, and provide just punishment."
  - The Court also noted that the initial sentence "fails in a message of deterrence."\*
    - \* Id. at 411.

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## What about mental health courts?

- A question to consider:
  - Are MHCs suitable for persons with autism??
  - Mental health courts in general
    - Mental health courts seek "to improve justice by considering the therapeutic and anti-therapeutic consequences that flow from substantive rules, legal procedures, or the behavior of legal actors."
    - They are designed to deal holistically with those arrested when mental illness, rather than criminality, appears to be the precipitating reason for the behavior in question.

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## Mental health courts, 2

- The mental health court judge seeks to divert the individual from the criminal court in exchange for an agreement to participate in community treatment, and to "help participants avoid future criminal court involvement."
- See generally, Michael L. Perlin, "Wisdom Is Thrown into Jail": Using Therapeutic Jurisprudence to Remediate the Criminalization of Persons with Mental Illness, 17 MICH. ST. U. J. MED. & L. 343, 366-67 (2013); Michael L. Perlin, "Who Will Judge the Many When the Game is Through?": Considering the Profound Differences between Mental Health Courts and "Traditional" Involuntary Civil Commitment Courts, 41 SEATTLE U. L. REV. 937 (2018).

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## Mental health courts, 3

- The answer:
  - "A mental health court specifically created to understand the relationship of the neurological component of the ASD population with the charged crime is greatly needed to protect this vulnerable group of people from being labeled as criminals. In most of these cases, education and therapy will make recidivism an unlikely outcome."
  - Robert Costello, *Book Review, Caught in the Web of the Criminal Justice System: Autism, Developmental Disabilities, and Sex Offenses* (Lawrence A. Dubin & Emily Horowitz, eds. 2017), 34 *Crim. Just.* 53, 54 (Spring 2019) (interview with Prof. Dubin).

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## Mental health courts, 4

- Note that at least one juvenile mental health court explicitly accepts individuals with autism.
  - Morgan Molinoff, *The Age of (Guilt or) Innocence: Using ADR to Reform New York's Juvenile Justice System in the Wake of Miller v. Alabama*, 15 *Cardozo J. Conflict Resol.* 297, 323-24 (2013), discussing the Court for the Individualized Treatment of Adolescents (CITA), Santa Clara, California.

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## Consider from a TJ perspective

- "The *perception* of receiving a fair hearing is therapeutic because it contributes to the individual's sense of dignity and conveys that he or she is being taken seriously."\*
- "Psychological testing and a comprehensive review of relevant contributing developmental factors can yield critical information that can provide mitigation and potential solutions consistent with the goals of therapeutic jurisprudence."\*\*
- \*Michael L. Perlin, Keri K. Gould & Deborah A. Dorfman, *Therapeutic Jurisprudence and the Civil Rights of Institutionalized Mentally Disabled Persons: Hopeless Oxymoron or Path to Redemption?* 1 *Pennsylvania, Pub. Pol'y & L.* 80, 114 (1995).
- \*\* Michael L. Perlin, Alison J. Lynch & Valerie R. McClain, "Some Things are Too Hot to Touch": Competency, the Right to Sexual Autonomy, and the Roles of Lawyers and Expert Witnesses, 35 *Touro L. Rev.* 405, 422 (2019)

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## From a TJ perspective, 2

- Humiliation and shaming contravene basic fundamental human rights and raise important constitutional questions.
  - These practices lead to recidivism, inhibit rehabilitation, discourage treatment, and injure victims.
- They also directly contravene the guiding principles of therapeutic jurisprudence ("TJ"), especially in the context of its relationship to the importance of dignity in the law.\*
  - \* Michael L. Perlin & Naomi Weinstein, *"Friend to the Martyr, a Friend to the Woman of Shame": Thinking About the Law, Shame and Humiliation*, 24 S. CAL. REV. L. & SOC. JUST. 1, 2, 5 (2014).

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## Conclusion

- Persons with ASD consist of yet another vulnerable population, the dispositions of whose cases are at the mercy of the quality and competence of attorneys, experts, judges, juries, and outdated court procedures.
- In order to effectively uphold constitutional and human rights, we must be vigilant in confronting ignorance, bias, and misguided pop-culture beliefs.

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## Conclusion, 2

- As we have made advancements in understanding mental illness and severe cognitive disability (although such advancements are still limited and lacking), we must work to make similar advancements to provide accurate and reliable information about the diagnosis of ASD and educate court participants on how to legally and therapeutically assist persons with ASD in the criminal trial process.

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